No. 118

In the Supreme Court of the United States

OCTOBER TERM, 1944

INDUSTRIAL ADDITION ASSOCIATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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No. 118

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v.

COMMISSIONER OF INTERNAL REVENUE

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MEMORANDUM FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals sustaining the respondent's motion to dismiss the petition for review (R. 99–102) is reported at 141 F. 2d 636. The findings of fact and opinion of the Tax Court of the United States in the case (R. 27–42) are reported in 1 T. C. 358.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 27, 1944 (R. 98–99). The

petition for a writ of certiorari was filed June 2, 1944. The jurisdiction of this Court is invoked under Sections 240 (a) and 262 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the Circuit Court, pursuant to Sections 1141 and 1142 of the Internal Revenue Code, should have undertaken to review the decision of the Tax Court notwithstanding the fact that a written stipulation, which was required by the statute, designating the Circuit Court as the court to review the case, was not entered into until after the expiration of the three-month appeal period, although a petition for review was filed within the period.

STATUTES INVOLVED

Internal Revenue Code:

SEC. 1141. COURTS OF REVIEW.

(a) *Jurisdiction.*—The Circuit Courts of Appeals and the United States Court of Appeals for the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board, * * *.

(b) *Venue.*—

(1) *In General.*—Except as provided in paragraph 2, such decisions may be reviewed by the Circuit Court of Appeals for the circuit in which is located the collector's office to which was made the return

of the tax in respect of which the liability arises or, if no return was made, then by the United States Court of Appeals for the District of Columbia.

(2) *By Agreement.*— Notwithstanding the provisions of paragraph 1, such decisions may be reviewed by any circuit court of appeals, or the United States Court of Appeals for the District of Columbia, which may be designated by the Commissioner and the taxpayer by stipulation in writing.

* * * * *

(26 U. S. C., Sec. 1141.)

SEC. 1142. PETITION FOR REVIEW.

The decision of the Board rendered after February 26, 1926 * * * may be reviewed by a Circuit Court of Appeals, or the United States Court of Appeals for the District of Columbia, as provided in section 1141, if a petition for such review is filed by either the Commissioner or the taxpayer within three months after the decision is rendered, * * *. (26 U. S. C., Sec. 1142.)

STATEMENT

On July 10, 1940, petitioner filed a petition with the Board of Tax Appeals (now the Tax Court of the United States) for a redetermination of deficiencies in income and excess profits taxes, together with penalties for failure to file returns, for the calendar years 1932 to 1936, inclusive, claiming that it was exempt from taxation

under the provisions of Section 103 (7) or (8) of the Revenue Act of 1932 and corresponding provisions of Section 101 of the Revenue Acts of 1934 and 1936 (R. 3–23). The Commissioner filed an answer (R. 25–27) and a hearing was held on the merits (R. 1). On December 30, 1942, the Tax Court filed its findings of fact and opinion, holding that while petitioner was not subject to the excess profits tax it was not an exempt corporation and was liable for income taxes and penalties for the taxable years (R. 27–42). The decision of the Tax Court was entered on March 12, 1943 (R. 42–43).

On June 11, 1943, one day before the expiration of the three-month appeal period allowed by Section 1142 of the Internal Revenue Code, petitioner filed a petition for review addressed to the Circuit Court of Appeals for the Sixth Circuit (R. 43–45). When the case subsequently came to the attention of the Department after the expiration of the appeal period, petitioner's counsel was advised that the Circuit Court of Appeals for the Sixth Circuit lacked jurisdiction to entertain the petition for review, since no written stipulation designating that court as the one to review the case had been entered into, as required by Section 1141 of the Internal Revenue Code. While the Commissioner believed that a stipulation entered into after the expiration of the appeal period would be ineffective to confer jurisdiction on the

Circuit Court, such a stipulation, reserving the Commissioner's right to file a motion to dismiss the petition for review and to question the timeliness and legal effect of the stipulation, was nevertheless executed on July 10, 1943 (R. 97–98).

The Commissioner subsequently filed a motion to dismiss the petition for review (R. 97), and the merits of the motion and of the case itself were briefed and argued together in the court below. On March 27, 1944, the court entered judgment sustaining the motion to dismiss (R. 98–99), and it is this judgment which petitioner seeks to have this Court review.

ARGUMENT

Petitioner's contention that the court below should have entertained the petition for review is correct only if Sections 1141 and 1142 of the Internal Revenue Code, *supra,* are to be interpreted as giving the parties to a proceeding before the Tax Court the power, after the expiration of the three-month appeal period, to confer jurisdiction on a Circuit Court of Appeals to entertain such a petition and to require it to do so. In arguing that Sections 1141 and 1142 should be so interpreted, petitioner for the most part relies upon the fact that in similar circumstances the Circuit Court of Appeals for the Fifth Circuit sustained jurisdiction in *Wegener* v. *Commissioner,* 119 F. 2d 49, certiorari denied, 314 U. S.

643[1] (Br. 10-14). The Government does not object to a resolution of the conflict between the decision in the *Wegener* case and that in the instant case by means of certiorari. We respectfully suggest, however, that the decision below is correct and that the problem may not be important. The matter is within the control of Government officers, and the issue is in any event a narrow one, arising only rarely.

In the *Wegener* case, the Circuit Court of Appeals for the Fifth Circuit held that a stipulation, practically identical to the one entered into in this case, was effective to confer jurisdiction on that court after the expiration of the appeal period, because Section 1141 of the Internal Revenue Code "fixes no time for making the agreement" and because the court found "no reason for writing such a limitation into the statute" (p. 49). The court below held to the contrary (R. 102). The question involved will not recur unless the Commissioner enters into the same type of stipulation under similar circumstances in the future. His authority to do so is discretionary, as petitioner admits (Br. 10). On the merits the court below seems clearly to be right. Section 1142 limits Section 1141 by

[1] This case was decided against the taxpayer on the merits, and it was the taxpayer who petitioned for a writ of certiorari. Accordingly, the present question was not involved in the petition.

imposing a three-month time limit upon the filing of petitions. This limitation is not stated or referred to in Section 1141 itself. No reason appears for not applying the same limitation to the filing of a stipulation pursuant to subsection (b) (2) of Section 1141, which is a prerequisite to filing a petition in the chosen court.

The two sections obviously are to be construed together. The jurisdiction conferred by Section 1141 cannot be exercised if a petition for review is not filed as required by Section 1142; compliance with the latter section is a jurisdictional requirement. *Commissioner* v. *Realty Operators, Inc.*, 118 F. 2d 286, 288 (C. C. A. 5th); cf. *Smith* v. *Commissioner*, 67 F. 2d 167 (C. C. A. 4th). Such a petition cannot be filed in a proper court, other than one designated in subsection (b) (1) of Section 1141, until the parties have selected the court by stipulation in writing. Until that has been done, a petition for review is not a petition for "such" review as is provided in Section 1141; and this is the only review for which a petition may be filed, under the express terms of Section 1142.

The provisions of predecessor enactments to subsections (b) (1) and (2) of Section 1141, although styled as relating to venue, have been regarded as defining the jurisdiction of the several Circuit Courts of Appeals. A petition brought to the wrong court should be dismissed. *Burnet*

v. *White Eagle Oil & Refining Co.*, 58 F. 2d 141 (C. C. A. 8th); *Ayer* v. *Commissioner*, 63 F. 2d 231 (C. C. A. 2d); *Holmstrom* v. *Commissioner*, 94 F. 2d 747 (C. C. A. 3d). Even if the effect of these subsections is to prescribe venue but not to restrict jurisdiction, the court below was not bound to exercise jurisdiction in the face of a petition and stipulation which did not conform to the statute. *Nash-Breyer Motor Co.* v. *Burnet*, 283 U. S. 483, 487.

It is a well-settled rule that statutory periods for appeal go to the jurisdiction of the appellate courts. *Old Nick Williams Co.* v. *United States*, 215 U. S. 541; *Decker* v. *United States*, 97 F. 2d 473 (C. C. A. 5th). It follows that neither the parties nor a court can extend the period by agreement or order. *Wayne Gas Co.* v. *Owens Co.*, 300 U. S. 131, 137; *Commissioner* v. *Realty Operators, Inc.*, 118 F. 2d 286 (C. C. A. 5th). It would conflict with this principle to hold that, after the statutory period for filing a petition to review a decision of the Tax Court had expired, a taxpayer and the Commissioner might confer authority to proceed upon a Circuit Court of Appeals by filing a stipulation which for the first time designated that court as the proper one to entertain the proceeding.

A contrary holding to that below would also go counter to the provision of Section 1140 of the Internal Revenue Code that—

> The decision of the Board [Tax Court] shall become final—
>
> (a) * * * Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; * * *

By virtue of this provision the Tax Court's decision in this case ripened into a final order in favor of the Government. The taxpayer clearly did not prevent that right from attaching by filing a petition for review in a court of his own choosing, without statutory authority. Neither, it would seem, could the Commissioner defeat the Government's right afterward, by stipulation or otherwise; for it is settled that he lacks power to waive periods of limitation under the tax laws. *United States* v. *Garbutt Oil Co.*, 302 U. S. 528, 533–534. See *Wilber Nat. Bank* v. *United States*, 294 U. S. 120.

Petitioner argues that Congress had no intention of depriving a taxpayer, whether or not he filed a return, of a right of appeal to the Circuit Court of the circuit in which he is domiciled and that it is unfair to deny petitioner the right of appeal after it relied on the *Wegener* decision as establishing that the court below had jurisdiction (Br. 11, 14). These arguments, however, cannot change the statute as written, which does not accord with petitioner's contentions. It is unfortunate, but of no legal consequence, that the right of appeal was lost through inadvertence.

CONCLUSION

The decision of the court below is correct, and the conflict between it and the decision in *Wegener v. Commissioner, supra,* should present no important question of law for the future.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
MELVA M. GRANEY,
Special Assistants to the Attorney General.

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